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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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APR 17 1997

Federal Communications Commission  
Office of Secretary

In the Matter of )  
 )  
Implementation of the Non-Accounting ) CC Docket No. 96-149  
Safeguards of Sections 271 and 272 of the )  
Communications Act of 1934, as amended )

**COMMENTS OF U S WEST, INC.**

U S WEST, Inc. ("U S WEST") hereby submits its comments on the proper interpretation of Section 272(e)(4) of the Telecommunications Act of 1996,<sup>1</sup> as requested in the Public Notice released by the Federal Communications Commission ("Commission") on April 3, 1997.<sup>2</sup>

I. **SECTION 272(e)(4) INTENDS TO ALLOW THE BELL OPERATING COMPANIES ("BOC") TO PROVIDE "INTERLATA SERVICES" DIRECTLY TO THEIR SEPARATE AFFILIATES, SO LONG AS THE PROVIDED SERVICES ARE NOT "INTERLATA TELECOMMUNICATIONS SERVICES."**

Standing alone, Section 272(e)(4) is rather straightforward. It states that a  
BOC –

may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are properly allocated.<sup>3</sup>

<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Act").

<sup>2</sup> Public Notice, Comments Requested in Connection with Expedited Reconsideration of Interpretation of Section 272(e)(4), DA 97-666, rel. Apr. 3, 1997 ("Public Notice").

<sup>3</sup> 47 U.S.C. § 272(e)(4).

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Simply put, if a BOC meets the two articulated conditions, Section 272(e)(4) permits it to provide any interLATA or intraLATA service or facility to its interLATA affiliate. If this were all we had to consider, the interpretation would be simple, and we likely would have no issue to deal with here. One cannot reasonably read these words, standing alone, as anything other than a grant of authority to the BOCs to provide any telecommunications facilities and services to its Section 272 affiliate.

The Commission concluded in the Report and Order, however, that Section 272(e)(4) could not be interpreted as a grant of authority to the BOCs because to do so would contravene Section 272(a)(2)(B), which imposes a separate-affiliate requirement on the BOCs' "origination of interLATA telecommunications services."<sup>4</sup> The Commission concluded that Section 272(e)(4) was intended only to impose a nondiscrimination requirement on a BOC's provision of services and facilities that the Act otherwise allows it to provide directly, such as network control signaling and the other "incidental services" authorized by Section 271(g)(1).<sup>5</sup>

This analysis is correct as far as it goes. Section 272(e)(4) applies to the facilities and services that the Act otherwise allows a BOC to provide directly, and it plainly imposes a nondiscrimination requirement. But this provision does much more than that, and it applies to more than just the "incidental" interLATA

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<sup>4</sup> In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking, 5 Comm. Reg. (P&F) 696, 775 ¶ 261 (1996) ("Report and Order").

<sup>5</sup> Id. ¶ 261, n.669.

services.

The trick here is to reconcile Section 272(e)(4) with Section 272(a)(2)(B) without doing violence to either of them. The answer, we believe, lies in the differences in wording between the two. Section 272(a)(2)(B) generally requires a BOC to utilize a separate affiliate to originate “interLATA telecommunications services.” Section 272(e)(4) permits a BOC to “provide any interLATA . . . facilities or services” to its separate affiliate.

We must assume that “interLATA telecommunications services” are not the same as “interLATA facilities or services,” else Congress would not have used different terms. This wording difference extends to Section 271, which prohibits a BOC from providing “interLATA services,”<sup>6</sup> except as otherwise allowed in Section 271. Section 271(b) allows the BOCs to provide certain “interLATA services” under specific circumstances.

For our purposes here, the critical provision is Section 271(b)(1), which allows a BOC to provide “interLATA services originating in any of its in-region States” when the Commission authorizes it to do so. Taking into account the Act’s definition of “interLATA services,”<sup>7</sup> Section 271(b)(1) authorizes a BOC (once it has Commission authorization) to provide –

telecommunications [originating in an in-region state] between a point located in [one LATA] and a point located outside such [LATA].<sup>8</sup>

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<sup>6</sup> 47 U.S.C. § 271(a).

<sup>7</sup> Id. § 3(21).

<sup>8</sup> Id.

Section 271(b)(1) gives a BOC blanket authority to originate interLATA telecommunications in an in-region state, once the Commission has granted it the requisite approval.

Section 272(a)(2)(B) curtails that authority by requiring the BOCs to utilize a separate affiliate to originate in-region “interLATA telecommunications services.” The Act does not define this term, but its meaning is easily derived. Given the definition of “telecommunications service” an “interLATA telecommunications service” is –

the offering of [interLATA] telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.

When a BOC provides an “interLATA telecommunications service” to the public, it must do so through a separate affiliate. But “interLATA service” plainly has a broader scope than does “interLATA telecommunications service,” and the difference between the two represents the interLATA services that a BOC may provide directly. That is, the interplay of Sections 271(b)(1) and 272(a)(2)(B) permits a BOC to provide directly any interLATA facility or service that is not offered for a fee directly to the public (actually or effectively).

Section 272(e)(4) takes this a step further by establishing that a BOC’s provision of this limited class of interLATA services and facilities to another carrier does not amount to its providing interLATA telecommunications services. We know this because Section 272(e)(4) authorizes a BOC to provide interLATA services and facilities to its own separate affiliate, but Section 272(a)(2)(B) does not allow a BOC

(as distinguished from its separate affiliate) to provide interLATA telecommunications services. Therefore, if a BOC provides permitted interLATA services and facilities (i.e., those that are not interLATA telecommunications services) to another carrier those services and facilities do not thereby become interLATA telecommunications services and need not be provided from a separate affiliate.<sup>10</sup>

In the Report and Order, the Commission rejected an argument by Pacific Telesis (or “PacTel”) along similar lines,<sup>11</sup> characterizing the argument as an attempt to distinguish retail and wholesale services, with the latter not subject to the separate-affiliate requirement because they are not “telecommunications services.” The Commission ruled that the Act’s use of “telecommunications service” was not intended to create a wholesale/retail dichotomy, because a wholesale service can be a telecommunications service. Rather, the term intended to distinguish common from private carriage.<sup>12</sup>

Though perhaps correct, that determination has little effect on the argument. Whether one characterizes them as “wholesale” or “private carriage” or something else altogether, interLATA services that are not also interLATA

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<sup>9</sup> Id. § 3(46).

<sup>10</sup> In this light, the absence of “origination” from Section 272(e)(4) probably has no significance. The appearance of that term in Section 272(a)(2)(B) was probably intended merely to distinguish the service for which a separate affiliate is required – the origination of an interLATA call – from the service a BOC may provide directly – the termination of an interLATA call.

<sup>11</sup> See Ex Parte letter from Michael Yourshaw, Wiley, Rein & Fielding, Counsel for Pacific Telesis, to William F. Caton, dated Nov. 27, 1996, at 1-2.

<sup>12</sup> Report and Order, 5 Comm. Reg. at 775-76 ¶¶ 263-65.

telecommunications services may be provided directly by the BOCs. And, if they are not otherwise interLATA telecommunications services, interLATA services do not become interLATA telecommunications services simply because a BOC provides them to its interLATA affiliate (or to another carrier). That is the meaning of Section 272(e)(4).

The Public Notice asks the significance of the reference to intraLATA services and facilities in Section 272(e)(4), noting AT&T's argument that this proves Congress intended no grant of authority because the BOCs need no authority to provide intraLATA services.<sup>13</sup> But the BOCs likewise need no authority – beyond Section 271(b)(1), as limited by Section 272(a)(2)(B) – to provide interLATA services and facilities (other than interLATA telecommunications services). In all likelihood, Congress intended Section 272(e)(4) as a general grant of authority to the BOCs to provide telecommunications services and facilities to their separate affiliates. Without that, AT&T (and others) would doubtless argue that the separation requirements limit the services and facilities that a BOC may provide to its separate affiliate.

The Commission's Public Notice<sup>14</sup> raises a series of questions, most of which go to the wisdom, as a policy matter, of allowing the BOCs to provide interLATA services and facilities to their separate affiliates. We note, first, that the Commission is engaged here in statutory interpretation, not policy making. As noted above, Congress has determined that the BOCs should be allowed to engage

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<sup>13</sup> Public Notice ¶ 2.

<sup>14</sup> Id. ¶¶ 3-4.

in this activity, and the Commission has no authority to prohibit them from doing so. Thus these questions are fundamentally irrelevant.

The Public Notice asks whether a BOC's provision of interLATA services to its separate affiliate gives rise to less serious concerns of discrimination and cost misallocation than would its direct provision of such services. Without question, these concerns are much alleviated in the former situation.<sup>15</sup> When a BOC provides interLATA services to its separate affiliate, it will do so subject to the Commission's affiliate-transaction rules and the separation requirements of Section 272(b). In particular, Section 272(b)(5) requires that such transactions be at arm's length, reduced to writing and available for public inspection. That alone ensures other carriers the ability to obtain the same services and facilities on the same terms. It also renders cost misallocation an irrational strategy: if all carriers can get the same terms, cost misallocation becomes a vehicle by which the BOC subsidizes its competitors.

The Public Notice asks the significance of the fact that the Modification of Final Judgment ("MFJ")<sup>16</sup> did not have – and Section 271 does not have – a

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<sup>15</sup> The Public Notice asks whether the extent of the concern for discrimination depends on the nature of the interLATA services and facilities the BOC provides to its separate affiliate. Id. ¶ 4. Intuitively, one would expect that to be the case, but it seems premature to attempt to deal with that here, given the limited scope of this aspect of the proceeding.

<sup>16</sup> United States v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). The Consent Decree resulting from this litigation was subsequently terminated. See Order, Civil Action No. 82-0192, 1996 U.S. Dist. LEXIS 9293 (D.D.C. Apr. 11 1996).

“wholesale” exception to the interLATA prohibition.<sup>17</sup> We believe these omissions have no significance to determining the meaning of Section 272(e)(4). The MFJ did not contemplate the creation of local competition sufficient to permit the BOCs to provide any interLATA services. In its theoretical construct, the BOCs’ supposed bottleneck monopoly precluded their providing interLATA services on either a wholesale or retail level.

Section 271 is similar, in that it presupposes the BOCs should not be allowed to provide any in-region interLATA services (other than the incidental services described in Section 271(g)) until they have created the conditions that will enable local competition to exist. But once those conditions exist, the Act will allow the BOCs to provide interLATA services, subject to the requirements of Section 272. The ability of a BOC to provide interLATA services directly to its separate affiliate is an aspect of those requirements, unrelated to the prohibition of Section 271.

The Public Notice also asks the relevance of the fact that a BOC may provide wholesale services and unbundled network elements to its separate affiliate, provided it does not discriminate in doing so. It then asks what, if anything, might justify not permitting the BOCs to provide wholesale interLATA services as well. The answer, in short, is that nothing would justify that disparity of treatment. LATAs are legal fictions with little relevance in the marketplace, and a BOC has no more incentive or ability to “cheat” in providing interLATA services and facilities to its separate affiliate than it has in providing intraLATA services and facilities.

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<sup>17</sup> Public Notice ¶ 3.



Finally, the Commission asks the BOCs to clarify the kinds of wholesale service they would seek to provide to their separate affiliates, using excess capacity on their official services networks.<sup>18</sup> U S WEST has no current plans to use its official services network in this fashion.

Respectfully submitted,

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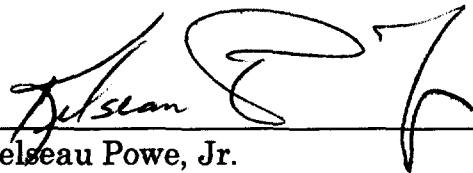
April 17, 1997

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<sup>18</sup> Id. ¶ 5.

## CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 17<sup>th</sup> day of April, 1997, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served, via hand delivery, upon the persons listed on the attached service list.

  
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